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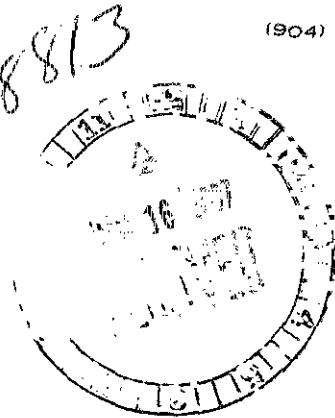
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March 12, 2007

**VIA FEDERAL EXPRESS**

Attn: Secretary  
Surface Transportation Board  
1925 "K" Street NW  
Suite 700  
Washington DC 20423

ENTERED  
Office of Proceedings  
MAR 16 2007  
Part of  
Public Record



RE: Savannah Port Terminal Railroad, Inc. – Petition for Declaratory Order-  
Certain Rates & Practices as Applied to Capital Cargo, Inc.  
STB Docket No. FD34920

Dear Secretary:

Please find enclosed an original and ten (10) copies of the following pleading:

- (1) Savannah Port Terminal Railroad's Motion to Strike Capital Cargo's Rebuttal to SPTR's Response to Capital Cargo's Motion to Dismiss, and

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me. A copy has been provided to opposing counsel.

Sincerely,

*P. Campbell Ford*  
P. Campbell Ford

Enclosure/

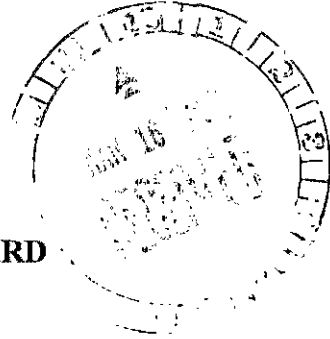
Original Motion to Strike  
10 Copies of Motion to Strike

C: Daniel L. Rosenthal, Esquire (1 copy only)

ENTERED  
Office of Proceedings

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Part of  
Public Record



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB Docket No. FD34920**

**SAVANNAH PORT TERMINAL RAILROAD, INC.- PETITION FOR  
DECLARATORY ORDER- CERTAIN RATES AND PRACTICES AS APPLIED  
TO CAPITAL CARGO, INC.**

**SAVANNAH PORT TERMINAL RAILROAD, INC.'S ("SPTR'S") MOTION TO  
STRIKE CAPITAL CARGO'S REBUTTAL TO SPTR'S RESPONSE TO  
CAPITAL CARGO'S MOTION TO DISMISS**

**SUBMITTED ON BEHALF OF SAVANNAH PORT TERMINAL  
RAILROAD, INC. BY**

P. Campbell Ford, Esquire  
Florida Bar No. 0480495  
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**BEFORE THE  
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STRIKE CAPITAL CARGO'S REBUTTAL TO SPTR'S RESPONSE TO  
CAPITAL CARGO'S MOTION TO DISMISS**

SPTR hereby files this Motion to Strike Capital Cargo's Rebuttal to SPTR's Response to Capital Cargo's Motion to Dismiss, and states:

On or about November 30, 2006, Capital Cargo filed a Motion to Dismiss SPTR's Petition for Declaratory Order.

On or about January 30, 2007, SPTR filed a response to Capital Cargo's Motion to Dismiss.

On or about February 21, 2007, Capital Cargo filed a Rebuttal to SPTR's Response to the Motion to Dismiss.

The Surface Transportation Board, ("STB") should strike Capital Cargo's Rebuttal for being a reply to a reply, and thus in violation of 49 CFR § 1104.13. Additionally Capital Cargo's Rebuttal should be stricken because of the redundancy of the arguments previously raised in its Motion to Dismiss and for the fact that Capital Cargo also raises new issues that it chose not to address previously before the STB or the State Court Judge in Chatham County. Capital Cargo can only be attempting to violate the STB's procedural rules to preclude SPTR from pointing out the lack of merit of the

brand new arguments to the STB. Capital Cargo improperly rehashing the same arguments unnecessarily delays this entire process and prejudices SPTR by requiring it to respond and incur additional attorney fees.

### **ARGUMENT**

49 CFR § 1104.13 states that in regards to filing pleadings with the STB, filing a reply to a reply is not permitted. Capital Cargo's "Rebuttal" is merely a response to SPTR's response to Capital Cargo's Motion to Dismiss. This fact, alone, justifies the STB in striking Capital Cargo's Rebuttal. However, additional grounds for striking Capital Cargo's Rebuttal, namely the redundancy and inconsistency of its arguments, are addressed below.

Capital Cargo begins its Rebuttal by summarizing the exact same arguments that it raised in its Motion to Dismiss, and then spending several pages explaining, once again, its position on each argument. The repetitive nature of these arguments clearly demonstrates that Capital Cargo's response is merely a 'second bite at the apple', which is not permitted. Accordingly, Capital Cargo's entire Rebuttal should be stricken.

Capital Cargo admits in Section III of its Rebuttal that the tariffs are not part of the Lease. The Lease with the Georgia Ports Authority ("GPA"), is the only contract that Capital Cargo is a party to in this action, and SPTR is not even a party to that contract. The entirety of SPTR's Petition to the STB is based upon the demurrage charges Capital Cargo accrued as a result of the tariffs created pursuant to 49 U.S.C. § 10746. The fact that both Capital Cargo and SPTR acknowledge that these tariffs are clearly not a part of the Lease or any other contract for that matter, only further demonstrates why this matter

is correctly before the STB and not a contractual matter as Capital Cargo continues to assert, despite its admission to the contrary. As such, Capital Cargo's Rebuttal should be stricken.

After now recognizing that SPTR and Capital Cargo are not actual parties to any contract, the only way that Capital Cargo can then backtrack to support its 'contract theory' is to now create a brand new argument by asserting that Capital Cargo is a "third party beneficiary" of the Easement Agreement that was executed between GPA and SPTR. (See Section I of the Rebuttal). Despite its ability and opportunity to do so, particularly since Capital Cargo obviously has no contract with SPTR, Capital Cargo never brought this claim at the trial court level, and never before mentioned it in any of its filings with the STB. This is an apparent back door attempt in violation of the procedural rules, to overcome a fatal legal deficiency in its argument with another legally deficient argument. There are certain requirements to be pled and proven in order to even claim that a party is a third party beneficiary, and it is improper to bring this legal argument now.<sup>1</sup> Capital Cargo is not permitted to continue to raise new issues by continuing to file responses to responses. Perhaps more importantly, Capital Cargo should not violate procedural rules with new claims that it fails to legally and factually substantiate. This warrants the STB striking Capital Cargo's Rebuttal.

There are still other reasons to strike Capital Cargo's improper response. If, however, the STB is somehow inclined to accept Capital Cargo's Rebuttal, despite its tardiness, then SPTR respectfully requests permission for an opportunity to address the deficiencies of Capital Cargo's third party beneficiary argument.

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<sup>1</sup> Capital Cargo merely cited the Georgia statute that allows a beneficiary of a contract to maintain an action. Capital Cargo did not address, much less establish, the specific elements required to establish that a third party beneficiary exists because it cannot.

All of Capital Cargo's arguments made in Section II are also redundant of the arguments asserted in its Motion to Dismiss. More specifically, Capital Cargo spends more than two (2) pages categorizing the same arguments, and using the same case law, to allegedly rebut two of SPTR's arguments. First, that there clearly was no contract between SPTR and Capital Cargo. Second, that the Lease Agreement certainly did not specify the services, rates, and conditions as required of a "contract" under 49 U.S.C. § 10709 in order for this matter to be outside of the STB's jurisdiction.

As stated by SPTR previously in its Response, the STB does not even need to consider the arguments raised by Capital Cargo (ie, using previous conduct to supply missing terms of a contract) because again, there was no contract between the parties. It also bears noting again that Capital Cargo even admits that the demurrage tariffs upon which SPTR has filed its Petition were not incorporated into any contract. Accordingly, these repetitious and inconsistent arguments should be stricken.

Similarly, Capital Cargo spends the next two (2) pages of its Rebuttal, once again, arguing that the non-waiver provision of the Lease is a matter of contractual interpretation for the Georgia Superior Court to decide. (See Argument III of the Rebuttal). This redundant argument is then wholly undermined by Capital Cargo's inconsistent admission that this Lease provision confirms that the tariffs' written-objection provisions were never part of the contract (p. 7) and that the Lease did not incorporate the tariffs (p. 8). Since the demurrage tariffs are the subject of SPTR's Petition to the STB, and the tariffs are clearly not a part of any alleged contract but created pursuant to 49 U.S.C. § 10746, then this matter is clearly not contractual in nature and is appropriately before the STB. Capital Cargo's inconsistent statements and

admissions clearly demonstrate that its arguments regarding interpretation of a Lease that has nothing to do with the applicable tariffs is irrelevant and should be stricken.

In the event that the STB does not strike Capital Cargo's response or does not deem it meritless, SPTR respectfully requests the opportunity to address the third party beneficiary argument deficiencies and any other new matter perceived by the STB as worthy of addressing at this late stage in the proceedings.

Capital Cargo raises other issues that are irrelevant and should be stricken as well. For instance, the fact that Capital Cargo alleges that had it chosen to appeal the trial court's order, it would have involved a multi-step discretionary appeal process is irrelevant. (See Section I of Capital Cargo's Rebuttal). The bottom line is that Capital Cargo did not appeal the trial court's order and it is not the STB's duty to decide whether or not the trial court erred by allegedly not considering 49 U.S.C. § 10709.

Another example is Capital Cargo's commentary about the notice-of-default provision of the Lease. (See Section III of the Rebuttal). All SPTR has stated in this regard is that if, the three deliveries per day was a contractual matter as Capital Cargo suggests, then Capital Cargo was required to file, and presumably would have filed, a notice of default for failure to provide three deliveries per day. But, not surprisingly, Capital Cargo did not do this, thus only illustrating further that this matter is not contractual. In that Capital Cargo has now admitted that the demurrage tariffs are not contractual in nature, this section of the Rebuttal is irrelevant and should also be stricken.

Additionally, the obvious absurdity of Capital Cargo suggesting that the demurrage tariffs are inapplicable to this matter, in and of itself, warrants the Rebuttal to be stricken. (See Section IV of the Rebuttal). The fact that Capital Cargo seems to be

suggesting that demurrage tariffs do not apply, (or cannot be charged for that matter), unless they were made a part of the contract is ludicrous and in violation of 49 U.S.C. § 10746, and ignores the obvious fact that SPTR's entire Petition to the STB is based upon the demurrage tariffs. This is only an extension of Capital Cargo's redundant argument that this matter is allegedly contractual, and as such, should be stricken.

Section V of Capital Cargo's Rebuttal is also redundant and should be stricken. Capital Cargo is making the same argument it made in its Motion to Dismiss, namely that SPTR has taken an inconsistent position that demurrage charges cannot be negotiated by the fact that negotiations allegedly took place previously. Despite the fact that SPTR denies that any "negotiations" took place, Capital Cargo, on one hand, continues to assert that they are not liable for the amount accrued in demurrage charges, but then also wants to introduce the subject matter of the alleged negotiations, when negotiations are inadmissible to prove liability or the amount of a claim disputed as to its validity or amount. Regardless, settlement negotiations are never considered evidence and are clearly never a winning argument as Capital Cargo postures. This inconsistency only further demonstrates why the Rebuttal should be stricken.

Finally, Section VI of Capital Cargo's Rebuttal should likewise be stricken for the fact that Capital Cargo is clearly only responding to SPTR's response that 49 C.F.R. § 1039.11 applies to the mere transportation of commodities from Point A to Point B, and does not include actual demurrage tariffs. 49 C.F.R. § 1039.11 is obviously a provision for the STB to interpret and apply to the instant matter, and does not warrant further commentary from Capital Cargo.

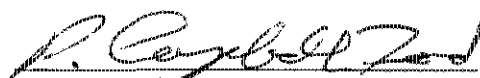


## SUMMARY

Capital Cargo's Rebuttal to SPTR's response to the Motion to Dismiss previously filed by Capital Cargo is a violation of 49 CFR § 1104.13, and must be stricken. The majority of the arguments raised in Capital Cargo's Rebuttal mirror the arguments addressed in its Motion to Dismiss. The redundancy of these arguments is a further ground for the STB striking Capital Cargo's response. Capital Cargo has also attempted to raise, for the first time, additional arguments/defenses in its desperate attempt to show this matter is allegedly not appropriately before the STB. The new arguments raised were ones that Capital Cargo could have and should have raised in its Motion to Dismiss, but Capital Cargo just chose not to. For all of the reasons stated above, Capital Cargo's Rebuttal should be stricken and the STB should not consider any of the arguments or commentary made within the Rebuttal. However, in the event that the STB is inclined to consider Capital Cargo's Rebuttal, even though Capital Cargo failed to properly assert a procedural, factual or legal basis, then SPTR respectfully requests, *inter alia*, an opportunity to address the arguments raised, especially the ones addressed for the first time.

**VERIFICATION**

I, P. Campbell Ford, declare under penalty of perjury that the foregoing is true and correct and that I am qualified and authorized to file this pleading. Executed on March 12<sup>th</sup>, 2007.

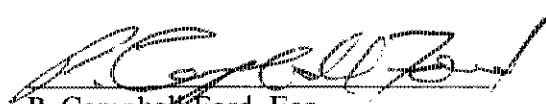
  
P. Campbell Ford, Esq.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Secretary Surface Transportation Board, 1925 "K" Street NW, Suite 700, Washington, DC 24023 via overnight mail and to Daniel L. Rosenthal, Verrill Dana LLP, P.O. Box 586, One Portland Square, Portland, ME 04112-0586 via U.S. Regular Mail on this 12<sup>th</sup> day of March 2007.

Dated: March 12<sup>th</sup>, 2007

Respectfully submitted,

  
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